# 2014 Annual Report

## Alberta Property Rights Advocate Office

22 June 2015

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# Advocate's Message

22 June 2015

The 2014 Annual Report of the Property Rights Advocate Office is the third report for what still is a unique Office in Canada. In this context, it seems appropriate to be a bit more introspective in tone - to reflect not just on substantive issues of property rights, but also on the worth and value of a new and evolving Office like this in the cause of property rights in Alberta.

In assessing the state of property rights in our province, there can be a temptation to complacency – to compare ourselves to other provinces and countries, and conclude that Alberta is relatively well-placed when it comes to protecting property rights. There certainly would be an element of truth in such a conclusion, but it would be an incomplete answer to an unspoken question.

With the greatest of respect to the legislators, jurists and stakeholders who have worked to protect property rights in Alberta, we should not be content to say simply that Alberta is equivalent to or even better than others at protecting property rights. The real question should be whether we are the best that *we* can be.

The fundamental importance of the real question – "can we do better?" – is rooted in the reality that the protection of property rights is not really about class or ideology or partisan interests. Rather, respecting property rights is about maintaining the Rule of Law, and affirming the respect under the law that every individual is entitled to receive.

This is why maintaining a strong, stable, predictable system for the protection of property rights is important to all Albertans, across every demographic factor. It is one of the elements by which we both measure and maintain a free and prosperous society.

I believe that the Property Rights Advocate Office has given value to Albertans, as an information resource, and as a public voice for landowner interests and concerns. I also trust it can be said that we have served Albertans well, with all of the dignity, honour and respect they have a right to expect from their public servants.

***Original signed***

N. Lee Cutforth, Q.C.
Alberta Property Rights Advocate
Lethbridge, Alberta

# Introduction

Contained within the legislated mandate of the Property Rights Advocate Office (PRAO) is the role of promoting the protection of the property rights of the people of Alberta. The Office stands ready to assist Albertans, government agencies and ministries as well as Members of the Legislative Assembly (MLAs) in understanding property laws and procedures. The Office also serves as a public voice for landowner concerns, advocating for fairness and balance when property rights are affected by provincial laws and policies.

Under section 5 of the *Property Rights Advocate Act*, the Property Rights Advocate is required to file an Annual Report with the Speaker of the Legislative Assembly. That report must summarize the activities of the Office in the preceding year, and set out any recommendations that the Advocate deems appropriate. These recommendations represent an important role of this Office – articulating practical ways to strengthen and improve property rights in Alberta.

Deciding which concerns will form the basis of a recommendation is a function of both the frequency with which concerns may have been brought to the attention of our staff, and also the significance or severity of the consequences if those concerns are not addressed.

For example, in the 2013 Annual Report, the recommendation to not privatize the Land Titles Office reflected a consistent preference stated by stakeholders at various meetings throughout the year. Similarly, the recommendation to effectively raise the rate paid to landowners for entry fees under the *Surface Rights Act* was based on a consistent theme from landowners that the amount of compensation did not fairly correspond to current market values or the residual liabilities that landowners faced from unwanted incursions onto their property.

On the other hand, the recommendation in the 2013 Annual Report to remove the municipal power to expropriate land for the purpose of re-selling it as building sites was based on only two calls to this Office. While this was not indicative of a widespread practice, the magnitude of the issue for the affected landowners, and the potential consequences to other landowners in similar circumstances in the future, were severe enough to address with a recommendation in the 2013 Annual Report.

The evidence that I have relied upon in making observations and recommendations is anecdotal in nature. This Office has neither the mandate nor the resources for a comprehensive survey of landowners in Alberta. Instead, we depend not only on the initiative of stakeholders who bring their concerns to our attention, but also diligent monitoring of news media, for gathering reports on relevant property rights issues. This approach may not carry a statistical certainty in relation to the population of Alberta landowners as a whole. However, the methodology still provides a direct, efficient and factually accurate way for meaningful concerns to be raised on behalf of Alberta landowners.

# Activities

In 2014, the Property Rights Advocate Office increased its staff complement to four full-time employees, consisting of the Advocate and an Administrative Assistant based in Lethbridge, as well as a Director and a Public Engagement Officer based in Edmonton.

In addition to the substantive work of our statutory mandate, the PRAO has been working to strengthen administrative effectiveness and increasing the interaction between the Office and various stakeholders.

The PRAO continues to:

- strengthen its profile and communications within the Alberta Public Service
- build public awareness of the Office's role
- develop policies and procedures to guide the operations of the PRAO

The PRAO's staff members in Edmonton also initiated an informal community of practice among advocacy offices within the Alberta Public Service. The purpose of this initiative is to improve communications between advocacy offices, find efficiencies and share best practices for serving Albertans.

The number of stakeholder contacts to the Office continues to be modest, but steady. In 2014, we received a total of 232 service requests, a slight increase over 2013. Contacts come from across the province – no one region dominates as a source for concerns or comment on behalf of landowners. As was the case in 2013, we did not process any complaints under section 4 of the *Property Rights Advocate Act*.

PRAO staff participated in 12 speaking engagements, including panel discussions in 2014. In addition, we have increased activities aimed at outreach within the public service. For example, PRAO staff participated in a series of roundtables on energy development in or near urban areas, including urban drilling, and spoke before the Environment and Natural Resources working group of provincial Assistant Deputy Ministers, concerned about energy and natural resources issues.

The PRAO continues to be available, as an impartial, non-partisan resource, to the Members of the Legislative Assembly and their research staff. I have had informal discussions with Members of the Legislative Assembly from three of the four political parties with a caucus in the Assembly in 2014, as well as discussions with a researcher for the fourth party. I also sent regular communications to each party caucus represented in the Legislature, to confirm my ongoing availability to discuss property rights issues.

The MLAs and their constituency offices are important conduits for channeling constituent concerns to the attention of the PRAO. This Office will continue to foster cordial relations with the various MLAs, for the benefit of all Albertans.

The parameters of our current resources do limit the PRAO's ability to be more proactive in seeking engagement opportunities. Accordingly, we continue to rely upon the interest and initiative of stakeholders in planning speaking engagements. In this, we are committed to being as accessible and responsive as possible to invitations that are extended to this Office.

I filed the 2013 Annual Report with the Speaker's Office as an intersessional deposit on June 2, 2014. The Report contained five recommendations, which were based on discussions with various landowners and stakeholders throughout 2013.

In the fall 2014 sitting of the Legislative Assembly, the 2012 and the 2013 Annual Reports were referred to the Standing Committee on Resource Stewardship. The Committee, pursuant to the *Property Rights Advocate Act*, was required to review the documents and report back to the Assembly.

On December 10, 2014, I appeared before the Committee to discuss the reports and the recommendations they contained. In early February 2015, the Committee on Resource Stewardship filed a copy of their Review of the Alberta Property Rights Advocate Office 2012 and 2013 Annual Reports as an intersessional document. The report is available online.

The Committee's deliberations are discussed further, in another section of this Report. However, at this point, I wish to express my thanks and appreciation to the Assembly Clerk's staff as well as the Chair of the Committee at that time, former MLA for Dunvegan-Central Peace-Notley, Hector Goudreau, for their interest, courtesy and grace throughout the review process.

The recommendations discussed with the Committee last December represented relevant issues, raised on behalf of Alberta landowners, and were, I trust, a productive use of the legislators' time.

The fundamental purpose of all of the foregoing activities, whether administrative in nature or as an expression of our statutory duties, is to encourage a culture of respect for, and sensitivity to, property rights in Alberta. In doing so, we remain committed to the standard of a non-partisan, impartial resource on property rights issues, providing objective information and serving as a public voice for property rights concerns.

# Select Observations

### Municipal Issues

Municipal government issues continue to make up a significant portion of the calls to this Office. Many of those calls relate to a municipality's powers to regulate land use.

While those powers do not fall within the concept of a government-sanctioned taking upon which the *Property Rights Advocate Act* has been framed, there is no doubt that land use regulation does affect a landowner's right of use over property. As a result, land use regulation has a direct bearing on the degree of freedom with which a landowner may exercise property rights in land ownership.

In fact, municipal land use regulatory powers, as a property rights issue, cut across the rural–urban demographic spectrum. These kinds of issues impact rural and urban Albertans alike. They reinforce the proposition that property rights – and a transparent and consistently applied system to protect them - are important and meaningful to all Albertans.

The PRAO continues to hear about municipal-related issues that were noted in the 2013 Annual Report, in particular, those that pertain to:

- the lack of an effective process, short of litigation, that would resolve disputes with a municipality, which relate to fair process (for example, if a landowner claimed that a land use bylaw was not being applied fairly or consistently)
- the lack of a right to compensation in cases where the regulatory actions of a municipal government have a detrimental effect on the value or marketability of an individual's property (for example, by the imposition of new land use restrictions).

As noted in the 2013 Annual Report, the PRAO continues to monitor the ongoing review of the *Municipal Government Act*, and the extent to which these concerns may be addressed.

## Organization and Structure of the PRAO

In some respects, the *Property Rights Advocate Act* established this Office as an odd and somewhat imprecise hybrid structure. On the one hand, the legislation requires the Annual Report to be filed with the Speaker of the Legislative Assembly. This implies a certain operational independence from the government, in terms of the observations and recommendations that can be identified and presented on behalf of Albertans.

On the other hand, the Office is located administratively within the Ministry of Justice and Solicitor General. As a result, there can arise certain bureaucratic expectations about the measure of departmental oversight in how we craft those observations and recommendations. This, in turn, may appear to detract from the impartiality that is required in the execution of our statutory duties.

Generally speaking, this has not caused a chronic problem in the operation of this Office. I can say, without reservation, that all of the Annual Reports I have filed were prepared with complete integrity, and represent my uncompromised observations and conclusions as the Property Rights Advocate.

It should be acknowledged that given the newness of an Office like this, and the fact that there is no template to follow, the PRAO is a work in progress. It is somewhat experimental in nature, which in turn suggests an incremental approach to assessing our operational model. Accordingly, it may be imprudent at this time to make any dramatic recommendations regarding our structure, mandate or placement within the government organization.

In fact, our current placement within the Ministry of Justice and Solicitor General (Justice Services Division) has provided us with valuable administrative support. I even would argue that if the PRAO is to remain within the structure of any government ministry, this is the most optimum place to be located.

However this is not to say that we should be indifferent to optimising our structural integrity. We need to be open to ways of improving the institutional and systemic impartiality of the Office. In time, this may lead to consideration of making the Property Rights Advocate an Officer of the Legislature, or a part of some future entity, like a hypothetical "Advocates Secretariat".

Ultimately, impartiality and integrity in the execution of duties should not depend only on the personal integrity of the incumbents of this Office or the Ministry in which the Office is placed. As much as possible, we should seek to institutionalize that impartiality and integrity through the governance structures in which we operate.

The extended and ongoing process of evaluating PRAO's role and place in government also should involve assessing our existing set of duties, and honestly assessing their respective relevance and efficacy. One of this year's recommendations is intended to do just that.

It is interesting to note that one Alberta advocacy group, Grassroots Alberta, has gone so far as to call for the responsibilities and powers of the Property Rights Advocate Office to be significantly expanded. Whether or not that ever happens will depend upon the future policy directions that may be chosen by the elected legislators.

However, any expansion in the role of the PRAO must be based upon both a commitment to sufficient resources to maintain such an expanded role and an assurance to not compromise the impartiality of our most important duty as a public voice for landowner concerns.

Regardless of how this Office may evolve over time, even in its present form, the Office continues to deliver value to the people of Alberta. Working to raise sensitivity of property rights issues within government, we also, through the preparation of the Annual Reports, have:

- articulated principles of property rights as an important component of the Rule of Law;
- brought forward real-life experiences and concerns of Alberta landowners;
- suggested practical ways to strengthen and better protect property rights for all Albertans.

## Past Recommendations

During the fall 2014 sitting of the Legislative Assembly, the 2012 and 2013 Annual Reports of the Property Rights Advocate were referred to the Standing Committee on Resource Stewardship.

Ultimately, of the six recommendations contained in the two reports, the Committee accepted one in its entirety:

> **Recommendation 2013.01** – that the Government retain the direct and full ownership and operation of the land registry system under its existing format in the Land Titles Office.

One recommendation was accepted in principle:

> **Recommendation 2013.03** – that the Legislature amend section 19(2) of the *Surface Rights Act* to allow the amount of entry fees to be set by regulation...

The Committee did not accept the remainder of this recommendation, which offered the suggestion that right of entry fees initially be established at a rate of $1,200 per acre.

Two recommendations were referred by the Committee for further study:

> **Recommendation from the 2012 Annual Report** – that the Legislative Assembly study and implement the availability of beneficiary deeds as an estate planning tool in Alberta, based upon the Montana model, with the appropriate legislative and regulatory amendments being made to our existing testamentary land conveyancing regime.
>
> **Recommendation 2013.04** – that the Legislature amend the *Municipal Government Act* to delete section 14(2)(d), and remove from the municipal powers of expropriation the purpose of selling land as building sites.

Two recommendations were not accepted by the Committee:

> **Recommendation 2013.02** – that the Government direct the prompt commencement of a full public review of the *Surface Rights Act* and the *Expropriation Act*.
>
> **Recommendation 2013.05** – that the Legislature amend the *Emergency Management Act* to clarify and affirm the consistent respect for and deference to private property rights, even in the face of an emergency situation. Specifically, it is recommended that section 19 of the *Act* be amended to confirm that a natural disaster does not create licence to disregard the property rights of individual Albertans, nor does it absolve the authorities from a responsibility to follow the due process of law (including the need to obtain Ministerial authorization) if any encroachments do become necessary as an emergency response.

I am gratified that four of the six recommendations have at least a "path forward" to implementation and to contributing to the enjoyment of property rights in Alberta. As for the two recommendations that were not accepted by the Committee, I respectfully stand by those recommendations as modest, practical measures, and will continue to advocate for their implementation.

With respect to **Recommendation 2013.02**, given the intricate complexity of the surface rights regime, a comprehensive review of the *Surface Rights Act* still seems to be a prudent way to explore needed solutions to a number of problems, while at the same time minimising the risk of unintended consequences from a more piece-meal, *ad hoc* approach. In fact, a general review of the *Act* is consistent with the recommendation of the Alberta Association of Municipal Districts and Counties in its 2007 Report on the *Surface Rights Act* and recommended changes.

Similarly, a review of the *Surface Rights Act* (and the *Expropriation Act*) was a commitment made by the government of the day in its Response to the Property Rights Task Force, in February of 2012.

The fact that surface rights issues continue to be a recurring topic of calls to this Office suggests that the need for a review of the surface rights regime as a whole has not abated over time.

As for **Recommendation 2013.05**, contrary to what some Standing Committee Members seemed to believe, the proposal is not a radical departure from the existing law. Neither would it impose any new restrictions on first responders to an emergency situation. Rather, the Recommendation is meant simply to better articulate the spirit and intent of the existing law, and to make sure that the existing law is clearly understood and respected by those charged with carrying out the provisions of the *Emergency Management Act*.

The Civilian Review and Complaints Commission for the RCMP, which looked into the RCMP's Response to the 2013 Flood in High River, released its Interim Report subsequent to my appearance before the Standing Committee. That Report recognised a number of shortcomings in the RCMP actions in High River, including what the Commission called "… a lack of leadership in terms of supervisory guidance and clear policy direction…" (page 106). The Report also acknowledged that "… the sanctity of one's home from state interference is a deeply rooted legal principle." (page 109).

The Commission's unambiguous recognition of an important legal principle, and the acknowledgement of a failure of clear policy direction, led to their further observation that the anger felt by many High River residents was "understandable". This is consistent with my own observations in my 2013 Annual Report, and would seem to confirm the need for a firmer understanding of the responsibilities and due process requirements under the *Emergency Management Act*. Such observations by the Complaints Commission certainly seem to remove Recommendation 2013.05 from the judgment of one MLA on the Standing Committee, who dismissed it as a "ridiculous recommendation".

In time, I hope that Recommendations 2013.02 and 2013.05 will be given a sober second look by the Legislative Assembly, and recognised as temperate responses to issues that remain all too real and all too raw for a number of Albertans.

# Recommendations for 2014

The following recommendations are being made based on the information gathered and received by the PRAO in 2014, weighing factors such as severity of consequences and frequency of occurrence.

**Recommendation 2014.01** – that the *Property Rights Advocate Act* be amended to repeal the complaint mechanism established under section 4 of the *Act*.

Section 4 of the *Property Rights Advocate Act* sets out a process whereby a landowner who faces an expropriation or a compensable taking of land may file a complaint with this Office, requiring the Advocate to prepare a report on the matter. The gist of the process is that if the Advocate finds that the taking authority did not act in a manner that was consistent with the law authorizing the taking, then the Court or Compensation Board that is dealing with the taking must take the Advocate's report into account when determining any costs payable by the taking authority.

As has been noted in this and previous annual reports, this Office has not received any complaints that fall within the parameters of section 4 of the *Act*. There may be a number of reasons for this:

- for the most part, the issue with expropriations or compensable takings may not be that the rules are not being followed, but rather that the landowners do not like the rules to begin with (a situation that section 4 was not meant to address);
- section 4 does not give the Advocate any investigative powers to compel the production of evidence. If a complaint did find its way to our Office, we would rely entirely upon the goodwill of all parties (including a hypothetical taking authority that was not following the applicable law) to co-operate in the review. There is no direct sanction for not cooperating, and the evidentiary value of a report that does not have full cooperation may be brought into question;
- a finding by the Advocate under section 4 does not impose a sanction or otherwise give an effective remedy to a landowner. Instead, the Advocate's report merely becomes one more bit of information to be considered by the Court or Board that is presiding over the taking process. At best, a section 4 report may do nothing more than duplicate information that already is or could be before the tribunal. At worst, as noted in the preceding point, it may be of questionable probative value;
- as a result of the forgoing considerations, the issue of whether or not section 4 provides a meaningful contribution on behalf of landowner rights is a debateable point.

With the benefit of hindsight, there appears to be a lack of utility under section 4 of the *Act*, and it may not provide an effective remedy for landowners facing an expropriation or a compensable taking.

Rather than leaving an exaggerated sense of possible intervention by the Advocate on behalf of an aggrieved landowner, it may be preferable simply to remove the provision.

**Recommendation 2014.02** – that the *Municipal Government Act* be amended, to incorporate an administrative or quasi-judicial dispute resolution process, to allow landowners the option of resolving disputes with their municipal governments with respect to their land or land use, without being compelled to undertake the significant investment of resources that litigating in a court of law would entail.

A recurring dilemma that many landowners have when facing a land use dispute with their municipal government is the lack of availability of an effective remedy if the landowner has a grievance with the municipal process itself

Examples of such disputes include allegations that bylaws are not applied fairly or consistently, or that relevant facts were disregarded by the municipal authority in applying the bylaw.

Currently, when discussions or negotiations fail, the only remedy for a landowner who wishes to appeal beyond the municipal process, should discussion or negotiation fail, is litigation. This often creates a barrier to access to justice for the landowner, since litigation is expensive in terms of time, money and peace of mind. Many landowners believe that such costs outweigh the magnitude of their grievance and their available resources. To borrow an old analogy, in such situations, the current *Municipal Government Act* gives landowners a semi-trailer unit to haul a refrigerator, when what they really need is a good pick-up truck.

Providing that procedural pick-up truck to a landowner would not take away the right of the landowner to litigate. Under this proposal, while the landowner still could sue the municipality if he or she wished, an administrative or quasi-judicial resolution process would provide landowners with the option to divert the matter to a less expensive resolution method.

Expanding the jurisdiction of the Municipal Government Board in this regard would provide one possible model to consider. Certainly, other possibilities exist. In the complex process of the ongoing *Municipal Government Act* review, consideration should be given to the development of an administrative or quasi-judicial resolution process for landowners, which fits within the overall governance model of that *Act*.

By reducing the current level of costs for litigating in matters of municipal disputes, access to justice would be improved for the average landowner. Municipalities also could benefit from a corresponding cost saving. And, such a process may be more proportionate to the severity of the dispute in question.

**Recommendation 2014.03** – that the law of adverse possession be abolished in Alberta.

Adverse possession describes a legal process whereby a person who is not a registered owner of land can acquire legal ownership of that parcel of land from the actual existing registered owner, if the new person claiming ownership can prove continuous, open and exclusive possession or occupation of the owner's land for a period of 10 years. If the new person trying to acquire legal ownership can satisfy a Court of Queen's Bench Justice that the defined conditions have been met, then the Court can issue a judgment that would allow a new Certificate of Title to be issued in the name of a new owner. The former owner would not be entitled to receive any compensation for the land that was lost to the new owner.

At first glance, adverse possession may seem to be a matter merely of a private civil dispute between private individuals – balancing the claims of one landowner (or potential landowner) against another. It is not in the realm of a government-sanctioned taking of private property for an ostensibly public purpose.

However, there is a deeper issue to consider, in the effect that adverse possession has on the integrity of the land registry system, and the role that this integrity plays in protecting property rights.

Indefeasibility of Title refers to the concept that the land registry system is sufficiently secure, accurate and reliable, so that with very few exceptions, a Certificate of Title from the Land Titles Office is recognized as conclusive proof of

a registered owner's interest in the land described on it.

The concept of indefeasibility gives primary importance to registered interests in land over unregistered interests. A landowner does not have to prove a chain of historical Titles to establish the validity of his or her ownership in the land. The government, as owner and operator of the land registry, guarantees the inviolability of a current Certificate of Title as an accurate record of registered interests.

That indefeasibility of Title is diminished by adverse possession because it allows a legal claim to arise outside of the land registry process. No notice on the Title document is given of a potential adverse possession claim, so the integrity of the Certificate of Title could be compromised if such a claim arose. By the time a registered owner found out about such a claim being pursued, it could be too late to defend against the claim with any reasonable chance of success. The result would be to diminish the security provided to a landowner by the integrity of the Title record. In other words, the land registry system becomes less reliable.

Although not a widespread occurrence, the potential harm to landowners who could be caught unaware by an adverse possession claim is significant. Indeed, the problem was recognized by an Alberta legislator, who introduced a Private Member's Bill (204) in 2012 to abolish adverse possession. The Bill did not pass.

Perhaps it is time to reintroduce and pass such a measure, in order to strengthen the integrity of the registry system, and the reliability of the Title record. This would serve to preserve the protection that the land registry system is intended to offer land owners and the rights they hold in their property.

**Recommendation 2014.04** – that section 36 of the *Surface Rights Act* be amended to clarify and establish that payments ordered under the section do not conflict with the federal *Bankruptcy and Insolvency Act.*

Section 36 of the *Surface Rights Act* (*SRA*) is intended to provide a measure of compensation for landowners who are owed money under a surface lease or right of entry order made under the Act. In essence, if the operator (a company or person carrying out the resource or utility activity on the landowner's property) fails to make all of the payments owed under the lease or right of entry order when required to do so, the landowner can provide evidence of the default to the Surface Rights Board (SRB). The SRB in turn has the power to require the Provincial Government to pay compensation to the landowner, out of the provincial treasury.

In the summer of 2014, the Property Rights Advocate Office received a flurry of e-mails and telephone calls from a number of Albertans who were unhappy about the recent decision of the SRB, in *Petroglobe Inc. v. Lemke* (2014 ABSRB 401). In *Lemke*, the SRB noted that the operator who failed to pay the Lemkes also had filed for bankruptcy protection under the federal *Bankruptcy and Insolvency Act* (*BIA*). The SRB believed that ordering a payment under section 36 of the *Surface Rights Act* would create a preference in favour of the landowner as an unsecured creditor of the bankrupt company. They held that this in turn would conflict with the federal legislation, and so declined to make the section 36 payment order.

Although there was a heightened level of interest in the Lemke decision, the reasoning used by the SRB was not completely new. Indeed, I noted this issue in my 2013 Annual Report, and cited it

as one of a number of problems under the surface rights regime, to support my recommendation for a comprehensive review of the *Surface Rights Act*.

There are reasonable legal arguments that differ from the SRB's interpretation of section 36 and how it relates to the federal *BIA*. Specifically, those counter-arguments would hold that section 36 payments do not constitute a preference by the defaulting company of a merely unsecured creditor to the extent of conflicting with the *BIA*.

The payments offered under section 36 reflect a policy decision that landowners should not bear the risk of a loss of compensation for the use of their land in situations where an entry onto that land is forced upon them. Under the surface rights regime in Alberta, landowners are denied an ultimate "right to say no" to surface access for energy extraction or utilities facilities. As a result, because landowners are not making a freewill choice to enter a surface lease agreement, they are not voluntarily undertaking the risk of a defaulting renter. So, as a matter of fairness for the landowner, he or she should not be asked to bear the risk of having an operator default on lease payments.

Section 36 payments are more in the nature of a guarantee or indemnity offered by a third party (the Alberta Government). Perhaps the intent even can be analogised to insurance for the landowner. Regardless of the analogy used, the purpose is to cover a loss for a risk that is forced upon the landowner.

On this basis, it can be argued that section 36 payments are of a different nature than the preference of an unsecured creditor by a debtor itself, as contemplated by the *BIA*, and therefore should be distinguished from those creditor preferences that the SRB is trying to avoid.

At the time of writing this report, in a new decision (2015 ABSRB 280), the SRB has agreed to review its previous decision in Lemke. That process is expected to take a number of months, and even if successful, would apply only to the Lemke's claim against Petroglobe Inc. dealt with in the 2014 decision (although it perhaps could set a new precedent for future applications).

A more certain remedy, not just for the Lemke case, but for all landowners in similar circumstances, would be to amend the *Surface Rights Act*, so that the nature of section 36 payments is distinguished clearly from the nature of any payment that might conflict with the federal *BIA*.

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The foregoing Annual Report of the Property Rights Advocate for the year 2014 respectfully is submitted this 22 day of June 2015.

***Original signed***

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Alberta Property Rights Advocate

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